

No. 11666

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SAM ORMONT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT ORMONT'S REPLY BRIEF.

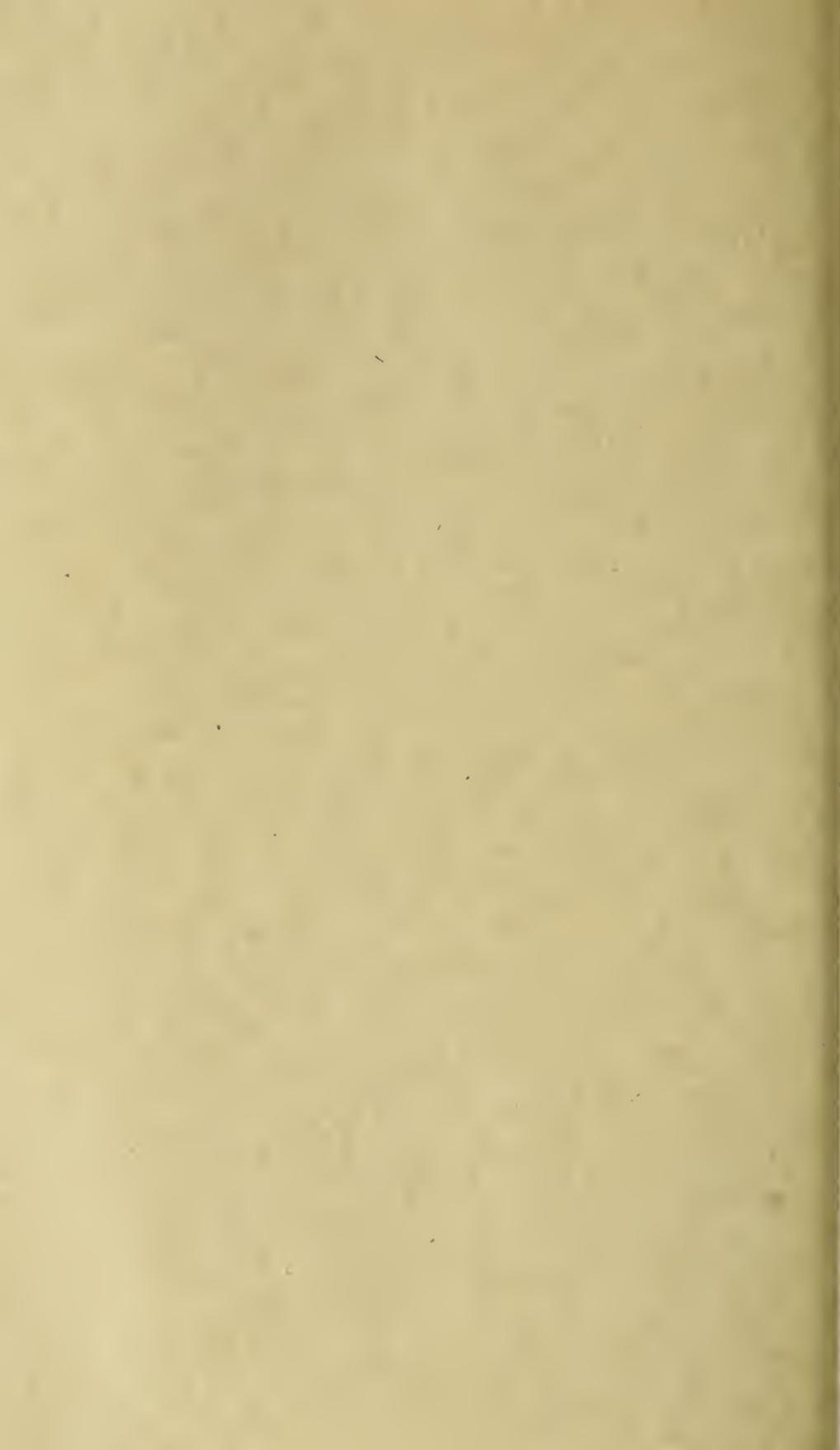
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*To the Honorable Ninth Circuit Court of Appeals of the
United States of America:*

Appellee's brief fails in general to answer most of the errors set forth in appellant's opening brief, but consists of a lot of mis-statements of the facts, which are certainly intended to prejudice this Court, and we feel that those mis-statements require some answer, and we wish to take them up under the numbers of specifications of errors assigned by appellant. All italics will be ours.

ERRORS NUMBERS 5 AND 6.

Defendant's Motion for Immunity Should Have Been Granted.

Appellee, in its brief, pages 22 and 23, endeavored to brush aside this error by claiming that the examination of the appellant, Ormont, before the Grand Jury had nothing to do with this income tax prosecution in this case, and states that nothing in the instant case relates to over-payments by Ormont to anyone else.

The testimony of appellant before the Grand Jury is set forth in full [R. Vol. I, pp. 214-236, inclusive] and in substance the appellant was interrogated at great length as to "extra charges," which he paid for slaughtering cattle during the year 1944 [R. 215]. He testified that these "extra services" or charges, during the year 1944, were between Six Thousand Five Hundred Dollars (\$6,500) and Seven Thousand Dollars (\$7,000) [R. 222]. That all these charges were entered upon his books [R. 227].

Government witness, Ernest Link, testified he made appellant, Ormont's, income tax returns from the books [R. 465].

Profit or Income.

He was also questioned concerning the *profit* he made [R. 230, 233, 235].

Appellee on page 23 of its brief says:

"In fact any over-payments which he made, tended to reduce his true gross income which he is charged with having under stated."

This is a fallacy. The Government in its investigation before the Grand Jury, was claiming that these over-

payments were illegal, and as a result of the testimony of appellant, actually indicted the ones to whom such over-payments were made on the ground that they were illegal, and the defendants in that indictment entered pleas of guilty [R. 204].

It follows that if such "over-payments" were in violation of the O. P. A., the appellant had no legal right to put them on his books as part of the cost and thereby reduce his true gross income, but would have been liable for an income tax on such over-payments and subject to indictment under the Internal Revenue Code, which is the very code and law under which the indictment in the case at bar was found.

See:

Research Institute of America, Federal Tax Coordinator, Vol. I, p. 4124 under D-61, citing income tax, Office Decisions, 3724, 1945, 60:

United States v. Schenck, 126 F. (2d) 702, in which certiorari was denied, 316 U. S. 705, and in which case the Court held that the claim of willfully attempting to evade income taxes may be committed by *taking fraudulent or illegal deductions* from gross income, as well as fraudulently failing to report income receipts.

Under the law of immunity, it is not necessary that the Grand Jury be investigating the offense for which the witness is eventually charged, but as shown by the authorities cited by appellant's opening brief, page 101:

"It is sufficient if there is a law creating the offense under which the witness may be prosecuted."

The law of immunity exempts him for criminal prosecution "from *any offense* that may be disclosed as a consequence of his examination." Immunity, to be of any effect, must be co-extensive with the constitution and *must protect the defendant from any prosecution for any offense* that may be disclosed as a consequence of his examination.

See:

Counselman v. Hitchcock, 142 U. S. 547;
Boyd v. United States, 116 U. S. 616;
United States v. Weinberg, 65 F. (2d) 394;
U. S. v. Andolschek, 142 F. (2d) 503 (C. C. A. N. Y.).

It makes no difference whether defendant's testimony was negative or affirmative, since it was possible that the questions might have brought forth incriminating answers.

See:

United States v. Armour and Company, 64 Fed. Supp. 855, and authorities cited;
U. S. v. Andolschek, *supra*.

It should be noted that the testimony of appellant before the Grand Jury was on October 10, 1945 [R. 214], and this was several months after the Revenue Department had started its investigation of appellant's income taxes, which, according to witness, Donald Burcher, commenced about the 23rd day of May, 1945. [R. Vol. III, pp. 1134-1135.] Appellant was not advised of his constitutional rights to refuse to testify before the Grand Jury and did not waive his right to immunity. In fact, as shown on

page 104 of our opening brief by a quotation from the Record, page 276, Mr. Strong stated that *The witnesses would not sign a waiver of immunity.* This entire case against appellant was based upon alleged violation of the O. P. A. regulations, and appellant's income therefrom, as is well illustrated by appellee's brief on page 7.

Where a defendant is subpoenaed and put under oath by a prosecution, the prosecutor in so doing knows that if he asks any questions, the answers to which might to any degree be incriminating, that he is exchanging immunity for testimony and whether such answers are incriminating is not the test. We quote from the case of *U. S. v. Monia*, 317 U. S. 424, at page 430:

“The legislation involved in the instant case is plain in its terms, and, on its face, means to the layman that if he is subpoenaed, and testifies, he is to have immunity. Instead of being a trap for the government, as was the original act, the statutes in question, if interpreted as the government now desires, may well be a trap for the witness. Congress evidently intended to afford government officials the choice of subpoenaing a witness and putting him under oath *with the knowledge that he would have complete immunity from prosecution respecting any matter substantially connected with the transactions in respect of which he testifies*, or retaining the right to prosecute by foregoing the opportunity to examine him.”

We call the Court's attention also to the case of *Armour and Company v. U. S.*, 64 Fed. Supp. 55, which, although a District Court opinion, is nevertheless very well reasoned and based upon the leading authorities which are cited therein and quotations taken therefrom, which apply to the case at bar.

Government Put Evidence Before Jury of “Over-Payments.”

Appellee claims there was nothing in the instant case relating to over-payments to anyone. We quote the following from the testimony of Samuel J. Phoebus [R. Vol. III, p. 1025] in which he is testifying as to a conversation with the defendant May 18, 1945, and says:

“We asked him if he had ever been required to pay to other people, amounts which he had not recorded on his books, and he said ‘No.’ We questioned him a little further and finally he said, ‘Yes, *there were some amounts that were paid over* that are on the books.’”

Appellant's counsel immediately moved to strike out the conversation and the Court said:

“That all goes to the general subject matter. The objection is over-ruled.”

The foregoing took place on June 5, 1947 [R. Vol. III, p. 1006], *five days later*, to-wit, June 10, 1947, at the afternoon session of Court [R. Vol. III, p. 1215], appellant's counsel made another motion to strike said evidence and conversation of May 18, 1945, and then the Court granted the same. [We quote from R. Vol. III, foot of page 1246]:

“The Court: All the motions to strike are denied, except your first motion to strike the testimony of the Witness, Phoebus, of the conversation on May 18, which is granted.”

This last motion and the order granting the same, were outside the presence of the jury. And the next day, namely June 11, 1947, the Court merely instructed the

jury that all conversations by Mr. Phoebus with the defendant, Ormont, prior to May 24, were stricken from the record, and the jury was instructed to disregard them. The Court did not advise the jury of the substances of the conversations so stricken, although the witness had testified to several conversations, including some that were not stricken, and it would have been impossible for the jury to have remembered the substances of those that were stricken, especially since this conversation had been allowed to remain in the minds of the jurors from June 5 until June 11, and this particular conversation had been emphasized to them as being proper, by the Court having denied the motion to strike the same immediately after it had been uttered, and this belated granting of a motion to strike the evidence, certainly did not erase from the minds of the jurors the impression the evidence had made thereon, as was said in the case of *People v. Bird*, 132 Cal. 261-264, with respect to such procedure:

“The practice, however, is one not to be commended, for there is inevitably some impression made and effect left upon the minds of the jurors.”

This is emphasized by the fact that Mr. Strong, the prosecuting attorney, and who, we understand, prepared appellee's brief, refers to this conversation that was stricken in said brief on page 5, at the foot of page 5, where he states:

“On May 18, 1945, the Federal Bureau of Internal Revenue made known to appellant the fact that their income tax returns for the calendar years 1942-1944,

inclusive, were under investigation, by requesting permission to examine appellant's books and records. Appellant thereupon immediately sought the advice of an attorney and an accountant, and upon their advice, filed jointly on May 24, 1945, a partnership return of income, showing additional, previously unreported income for the period from May 1, 1944 to April 30, 1945 in the sum of Seventy-One Thousand Three Hundred Eighty-Eight Dollars and Eighty-Four Cents (\$71,388.84)."

. There is absolutely no evidence *in the record* of any such fact having been made known to appellant on May 18, 1945. This gratuitous statement by appellee's counsel could only find support in the conversation above testified to by witness, Phoebus, as of May 18, 1945, and which, as we have heretofore shown, was stricken from the record. In connection with this statement, we also wish to call the Court's attention to the fact that appellee's counsel further mis-states the facts by stating that appellant thereupon immediately sought advice of an attorney "and an accountant." There is nothing in the record that the appellant ever sought or employed the accountant. All that appears in the record is that an accountant by the name of Mr. William S. Malin was employed by an attorney by the name of Mirman. [R. Vol. III, pp. 1192-1194.] As to when appellant sought the advice of Attorney Mirman, there is absolutely no evidence. Counsel again mis-states that appellant employed said accountant. (Appellee's brief, p. 15.) The motion for immunity should have been granted.

**Appellant Paid All Taxes on His Portion of
\$71,388.84.**

In connection with the above item of \$71,388.84 represented on Exhibit 6, it should be borne in mind that Exhibit 6 was a "joint venture" return for a "fiscal year," namely, May 1, 1944, to April 30, 1945, and that during the said fiscal year appellant filed, according to law, his estimate of his tax on his portion thereof and paid the same in conformity with the law. [R. Vol. III, pp. 1078-1079.]

Government's witness, Eustice, testified under cross-examination that this manner of accounting for and paying taxes on said income on the fiscal year basis yielded the government an over-payment of approximately Three Thousand Dollars (\$3,000.00) more income tax than the appellant would have been required to pay, had he followed the Government's system of accounting. [See: R. Vol. II, p. 861.]

Appellee Misstates Facts Concerning Invoices.

On page 7 of appellee's brief, we cite the following:

"In addition, certain sales and income from them in some instances were shown on invoices, but the invoices were not transmitted to the Acme Meat Company's bookkeeper by appellants, and as a result were not entered on its books, nor was the income included as part of the gross or net income for 1944 reported by appellants for income tax purposes on their calendar year returns [R. 414 ff]."

The foregoing is very misleading to the Court, to say the least, as it is not based upon a correct statement of the record. The alleged invoices, Exhibits 38 and 39, consisted of purported invoices, which witness, Link, stated he saw and were being used for scratch paper. All

these were 1942 invoices, and there is absolutely no evidence that they were not entered on the books. All the evidence in this connection was that by Mr. Link, that he never entered them, but he also testified that he never checked the books to see if they had been entered. We quote from Record Volume I, page 417, in reference to them:

“The Court: And they are all dated 1942?

“The Witness: Yes.

“The Court: Did you check your books to see if you had any corresponding entries of cash sales for that year?

“The Witness: No. I did not check them.

“The Court: You did not check 1942?

“The Witness: I did not check those against those periods, no.”

Thus the appellee is trying to get before this Court the false impression that in 1944 (the only year involved on this appeal) there were sales and income and invoices not entered on the books, all of which is false, as there is no evidence of any 1944 invoices not entered on the books, and the appellant having been acquitted by the Court for the years 1942 and 1943, it is prejudicial misconduct for counsel to try to get these matters before this Court, and lends emphasis to our contention in our opening brief that counsel for the Government misled the jury with his arguments in which there were misstatements (see: appellant's opening brief, p. 140), and further lends support to our motion made after acquittal of the appellant for the years 1942 and 1943 to strike all of the testimony of the witness, Ernest Link, for the years 1942 and 1943 and which motion was denied. See our opening brief, page 130, *et seq.*

No Falsification of Records.

On page 8 of appellee's brief, they again assert that appellant deliberately falsified his records and books and later drew checks to cover up the falsification. This is not true.

During the trial, Government's counsel made a similar statement, and the Court immediately struck it out and told the jury to disregard it, and told counsel that it was not proper. [R. Vol. II, p. 504.] We have complained of Government's counsel's improper argument to the jury on this point also in appellant's opening brief, pages 140 and 141. On this very subject, it was established conclusively that the records were not "falsified" but were accurate, when the items were so added, because they had been actually paid out. We quote from Record Volume II, pages 471-472, referring to these items:

"The Court: That was a recorded increase in the amount of *money paid* for the purchase of cattle.

"The Witness: That is right."

On page 472, in speaking of adding the item on the books as additional cost, the witness said of Mr. Ormont:

"Answer: He made a check out for it.

"The Court: He made what?

"The Witness: He made a check out for that increased amount.

"The Court: *He actually paid the additional money.*

"The Witness: He paid the additional money with a check which was drawn.

“The Court: *He paid the additional \$3,000.00.*

“The Witness: *Yes.*

“The Court: *So that the books were accurate when it said that he spent \$3,000.00 more.”*

The checks were introduced in evidence, showing the payment of the exact amount, being Exhibits “B,” “C” and “D,” Mr. Ormont’s personal checks, totalling \$3,682.00; which, the witness, Link, finally said, was the amount he had in mind in his testimony. See Record Volume II, pages 486-487, in which the witness stated there were no other changes in the books, so that appellee’s counsel’s statement that appellant drew various checks to cover up his original falsifications is itself false.

Appellee makes note of the fact that all of appellant’s specifications of error are not argued in our opening brief, and further, that we simply took bits of testimony and excerpts from objections and rulings. An examination of our brief will show that we always quoted sufficient of the record to show the points specified as error, giving the reference to the page number of the transcripts as required by Sub-division D of Rule 20. See Third Supplement to O’Brien’s manual of Federal Appellate Procedure.

In many instances the objections or errors specified were obvious and a mere statement thereof and of the record was sufficient, in our opinion, without the necessity of indulging in an argument, to this Honorable Court, of the merits thereof.

Former Jeopardy (Specification of Error No. 4).

Appellee's counsel, on pages 18 and 19, makes note of the granting of the mis-trial and the excusing of the first jury, and connects that with the consent of Ormont's counsel that it was not necessary for the Court to call the jury back into Court to excuse them. We wish to emphasize to this Court that the Trial Court first granted the motion of defendant, Himmelfarb's, counsel to declare a mis-trial and excused the jury, and all that Ormont's counsel ever was asked to stipulate to, and did stipulate to, was that since the Court had so granted the motion in the absence of the jury, *that we would not require the jury to be brought into Court and formally dismissed*, but we were by no means thereby stipulating to its dismissal which had already been ordered. Appellee's counsel, on page 19 of the brief, quotes a portion of a stipulation, but do not quote the qualification thereto, appearing on page 241 of the record, where the Court said:

“Unless it appears obvious from the statement or objection that it applies only to one person, but such general motions or objections are made throughout the trial, will apply to both.”

Thus showing that where an objection obviously appears to be made for one person only, and where it is so specifically stated by the counsel making it, as was the case on the motion to discharge the jury made by Mr. Katz in behalf of defendant, Himmelfarb, only, that then it should not apply to defendant, Ormont. Referring to the matter of dismissal of the first jury, appellee's counsel says that the Judge pointed out to Ormont that it was his understanding that the motion had been “joined in by both defendants.” All that the Court said was, “I was *under the impression* that the motion was made on behalf

of both defendants." The record shows that when Mr. Katz addressed the Court, he said, "If the Court pleases, *this is a motion on behalf of defendant, Himmelfarb*, to dismiss the indictment. . . ."

And following the statement of his motion to dismiss the indictment, then said [R. Vol. II, p. 246], "Now I wish to make one other motion, if the Court pleases, and that is a motion to withdraw a juror and to declare a mis-trial. . . ." (p. 257). Thus indicating clearly to the Court and to Mr. Ormont's counsel that from the motion, it not only appeared "obvious," as per the above stipulation, that it was only made for Himmelfarb, but it appeared specific that it was so made. But in any event, the Court in passing on appellant's motion to dismiss for once in jeopardy, laid little, or no, stress on his impression as to whether the motion had been for one or both, and then immediately said:

"Even so, in considering the matter on the merits, I do not think the motion for once in jeopardy plea is well taken. While the jury was sworn, there was not even a witness sworn, no opening statement to the jury, and there was nothing that the jury could decide it on. . . ." [R. Vol. I, p. 304.]

Appellee, on page 20 of his brief, seeks to charge appellant, Ormont, or his counsel, with having created the situation resulting in the once in jeopardy, which is a distortion of the facts. Neither Mr. Ormont, nor his counsel, had anything to do with that situation. It was Government's counsel, Mr. Strong, who had made a reference to another pending case, while the jury was being impaneled, and it was appellant, Himmelfarb's, counsel, who, without Mr. Ormont's or his counsel's prior knowledge, raised the point and made a motion to declare a mis-trial.

Defendant Has Vested Constitutional Right in the Jury as and When Duly Impaneled and Sworn.

Thus, as held by this Honorable Court in the case of *Conero v. U. S.*, 48 F. (2d) 69, there must be an absolute necessity before the Court is justified in discharging a duly impaneled jury.

We respectfully refer this Honorable Court to our argument and points and authorities on this plea of once in jeopardy in appellant's opening brief, pages 88-93 (not answered by appellee), and particularly call the Honorable Court's attention to the fact that appellant had a vested right in the first jury that had been so duly impaneled and sworn, and which was a constitutional right of which he could not be deprived without his personal consent. (Appellant's opening brief, p. 89.) (*People v. Schmitz*, 7 Cal. App. 330, at pp. 348-350.) His attorney, as such, had absolutely no authority, by stipulation or otherwise, to waive that constitutional right without express authority from appellant. (Appellant's opening brief, pp. 91-92.) Appellant's counsel in this case had no such authority and none is even indicated in the record, and that so-called stipulation could not be extended so as to preclude appellant from raising the plea of once in jeopardy, but such a stipulation could only be effectual for *ordinary procedural matters*. In this instance, however, the fact that appellant was present when Mr. Katz, who was not appellant's attorney, but was attorney for another defendant, was making a motion, certainly could not be extended over so as to even cause an inference to be

drawn that Mr. Ormont was, by his silence, bound thereby. As is laid down on page 386 of Volume I of Thornton on Attorneys at Law, where it is said, "An attorney certainly cannot bind his client by any unauthorized act, which amounts to a total or partial *surrender of his substantial right*," and is said in 3 Cal. Jur. 667:

"It is the general rule that an attorney cannot, by virtue of his general authority, *bind his clients by any acts* which amount to a *surrender* in whole or in part *of any substantial right*."

To the same effect, see:

2 Ruling Case Law, p. 995;

Wuest v. Wuest, 53 Cal. App. (2d) 339 at 345;

Spencer-Kennelly Ltd. v. Bank of America, 19 Cal. (2d) 586 at 593.

The foregoing California cases were civil cases, and it was held there that the attorney had no authority to "waive a substantial right of his client." In the *Wuest* case, the attorney had stipulated to waive findings, so that an appeal might not be taken from the judgment, and it was held that this was stipulating away a substantial right and was not binding. How much stronger should the rule apply in a criminal case such as this, and where, as here, the appellant had an absolutely vested right in jury that was selected and sworn?

Impanelment and Swearing of Jury Constitutes Jeopardy.

In addition to the authorities above cited and cited in our opening brief on this proposition, we wish to call the Court's attention to the following authorities:

People v. Hawkins, 127 Cal. 372;

Jackson v. Superior Court, 10 Cal. (2d) 350, 357;

Cooley's Constitutional Limitations, 6th Edition, 399;

People v. Schmitz, 7 Cal. App. 330;

People v. Young, 100 Cal. App. 18.

Court Virtually Amended Indictment (Specifications of Errors 1, 2 and 3).

Appellee, on pages 21 and 22 of its brief, in attempting to answer appellant's specifications of errors Nos. 1, 2 and 3, being the motion to dismiss the indictment, a motion for bill of particulars and motion for continuance (appellant's brief, pp. 22-23 and argument on which is presented on pp. 94-97) tries to justify the sufficiency of the indictment by saying that it was a standard indictment, which has been used in many cited cases, but in none of which is the "means" or "manner" of violation set forth. Whereas, in the case at bar the "means" and "manner" were specifically set forth, namely, that the evasion was committed by *filing an "income and victory tax return."*

Not only was this particular language of the indictment questioned in appellant's written motion to dismiss [R. 27], prior to plea, but also in the motion for bill of particulars [R. 58-59] and also in the oral objection to the

introduction of any evidence based on all of the grounds set forth in the written motion for a bill of particulars, and a written motion to dismiss [R. 326] and again when the prosecution opened its case and offered in evidence Exhibit No. 3 (Sam Ormont's income return for 1944). Appellant's counsel specifically objected to the introduction thereof on the ground of a *variance* between the indictment and the exhibit offered, and emphasized that the indictment was for an income and victory tax, whereas, the exhibit covered only income tax [R. 335-337].

The Trial Court ruled against all these matters on the ground that the words "victory tax" were surplusage. Appellee, in its brief, says, page 21, "While it is true that in Count 1 the return was described as an 'income and victory tax return,' it is clear that the words 'victory tax' are mere surplusage. There was no 'victory tax' for 1944 and no return for such a tax." Such a contention by appellee is no legal answer to the errors complained of. The indictment was found by the Grand Jury in the exact words appellee admits, and that was the charge which appellant was to meet and the prosecution could not ignore the words "victory tax return" as alleged in the indictment, but was compelled to either prove that indictment as found or none at all, just as was held by this Honorable Court in the case of *Carney v. U. S.*, 163 F. (2d) 784.

The indictment in that case as it came from the Grand Jury charged in the first count that defendant, "Made, forged and counterfeited K-14h" gasoline ration coupons. This Honorable Court, in that case, said, on page 790, "There were never any original K-14h gasoline ration coupons." Appellee says that in 1944, there was no "victory tax." The Trial Court permitted the indictment in that case to be amended by changing the "K-14h" to

“A-14h,” and this Honorable Court reversed the case on the ground that the Government was bound by the Grand Jury’s indictment and that the Court could not amend the same. This Honorable Court said, on page 790:

“The judgment in Count 1 of the indictment as made by the Grand Jury was that the defendants defrauded the United States *by forging and counterfeiting ‘K-14h’ gasoline ration coupons.* There were, however, original ‘A-14h’ coupons. It may well be that the Grand Jury intended to use the letter ‘A’ instead of ‘K,’ but neither the Trial Court nor this Court can speculate on the intent of the Grand Jury. Because it is probable that ‘K’ was inadvertently used instead of ‘A’ does not authorize any Court to proceed under such assumption. The conviction and judgment as to Count 1 must be reversed.”

So, the mere fact that there was no “victory tax” for 1944 does not change the fact that the Court could not disregard the indictment, and when the prosecution’s attention was called to this fact, its only procedure would have been to have re-submitted the matter to the Grand Jury and let that body find the new and properly drawn indictment. The judgment in that case was that, as this Court said, the defendants defrauded the United States and then alleged the “manner” in which that defrauding was accomplished, namely, the kind of an instrument that was used. As this Court says, that such alleged defrauding of the Government was “*by forging and counterfeiting ‘K-14h’ gasoline ration coupons.*” Had the Court, in that case, instead of amending the indictment, permitted the prosecution to introduce in evidence “A-14h” coupons instead of “K-14h” coupons, there would have

been a variance. So in the case at bar, the Court allowing the prosecution to introduce a different instrument, namely, Exhibit 3, rather than the one charged in the indictment certainly constituted a variance. This is well demonstrated by the case of *Dodge v. U. S.*, 258 Fed. 300, 305, which case this Honorable Court relied upon in the *Carney* case and in which case certain words were by the Court struck from the indictment as "surplusage," without any objection. Nevertheless, the Appellate Court held that such error was of the most serious kind, and that it was fatal to a verdict upon that count. To the same effect:

Ex parte Bain, 120 U. S. 1;

Steward v. U. S., 12 F. (2d) 524, decided by this Honorable Court;

U. S. v. Norris, 281 U. S. 619-623;

Edgerton v. U. S., 143 F. (2d) 697 (9th Circuit).

In this connection, based upon the foregoing authorities, we re-affirm that our specification of error No. 73 argued on page 83 of our opening brief and being an instruction given by the Court that the words "victory tax" in the indictment were surplusage, and may be disregarded, was well taken, and we submit that the motion to dismiss the indictment should have been granted, the objection to the introduction of Exhibit 3 should have been sustained, and all of those rulings were fatal errors. These acts of the Court were equivalent to amending the indictment by striking a part thereof.

Motion for Acquittal Should Have Been Granted Appellants. (Specifications of Errors Nos. 48 and 49. See Appellant's Brief Pages 125, et seq.)

For the same reasons given above, showing that the motion to dismiss should have been granted, and that the objection to the introduction of Exhibit 3 should have been sustained on the grounds of variance and that the instructions of the Court to the jury that they could disregard part of the indictment was erroneous by the same token the motion for acquittal on Count 1 should have been granted, as there was absolutely no evidence of the defendant ever having prepared and filed for the year 1944 *an income and victory tax return* as charged in the indictment, and which is charged therein as the means by which the appellant violated the law.

The Court Erred by Denying Defendant's Motion to Strike the Testimony of Witnesses Link and Eustice Pertaining to the Years 1942 and 1943. (Specifications of Errors Nos. 50 and 51, Appellant's Opening Brief Pages 130, et seq.)

Appellee's only answer to these motions and the authorities we cited in our opening brief is that they disagree and then state that because appellant was acquitted on the charges in the indictment for those two years, that he could not complain, and then appellee attempt, to show that that evidence nevertheless was received with relation to willfulness. The authorities cited do not sustain the appellee. The only time evidence of other crimes or similar offenses may be used to show willfulness is when such evidence of such other offenses is sufficient to satisfy the Trial Court that such other offenses have been proven. We went into the authorities in our opening

brief and showed that the Trial Court, in this instant, held that they had not been proven, and therefore acquitted the defendant; hence, the evidence was not admissible under any theory as to Count 1 and should have been stricken from the records before that count was submitted to the jury. Having left the evidence before the jury, it was used by the prosecution as the means of producing the verdict. This is demonstrated by the following argument to the jury made by the prosecuting attorney, in which we have assigned this error. In Record Volume IV, page 1466, counsel is arguing to the jury about Sixty-Three Dollars (\$63.00) interest *received in 1943* and says:

“Was that \$63.00 interest reported on the return where it calls for the reporting of interest in the year 1943? Just remember now, you are not trying it for 1943 only with reference to 1944, but on the element of willfulness whether he willfully, as charged in the indictment in 1944, attempted to defeat and evade a large part of his tax, you can take that into account too. It is another incident of concealment of something or other?”

And on page 1462, Government's counsel said:

“And then Mr. Link also told you that he subsequently obtained possession of some invoices, invoices which he never recorded on the books, because, as he told you, he had never been given those invoices. And what did these invoices show, ladies and gentlemen, those invoices showed on their face —they were part of the exhibits; you can examine them—they showed on their face that the money shown on them was paid, the date it was paid and

it had Mr. Ormont's signature. That is some more money that isn't on the books, *some more money unreported*, some more evidence pointing to the deliberateness and willfulness of the activities of Mr. Ormont."

Those invoices are Exhibits 38 and 39 and were testified to by Mr. Link on pages 414, *et seq.*, and were admitted in evidence as part of the testimony of Mr. Link *for the year 1942*, as all of them were dated in 1942 and all his testimony with regard to the books and these exhibits had nothing to do with 1944, consequently, had our motion to strike his testimony for the years 1942 and 1943, been granted, such evidence and exhibits would not have been before the jury and counsel for the Government could not have argued, as he did, without going outside the record and here he indicates in his argument to the jury that they were unreported income implying that they were income for 1944. As to Mr. Eustice's testimony pertaining to 1943, Government's counsel, on pages 1476, *et seq.*, says,

"Well, in 1943, out of the \$12,000.00 he bought about \$8,000.00 worth of bonds. Remember that testimony, \$8,000.00 worth of bonds. That I assume is intended to show, or at least you are supposed to draw the inference from that, that the unreported income, which Mr. Eustice claims this man accumulated during that year, wasn't really accumulated during that year, because he bought \$8,000.00 worth of bonds.

"Take the \$8,000.00 and then look at this schedule No. 42, which shows how many bonds were actually bought during *that year* and see if you don't find over \$50,000.00 worth of bonds bought *that*

year—\$50,000.00 worth of bonds—some such sum. *Just look at them.* They are enumerated on the schedule and it is in evidence.

“What is \$8,000.00 off that? It is \$42,000.00. Well, let’s assume he had \$8,000.00 in cash. Does that change the story or the picture that was presented here by Mr. Eustice from these records? I submit to you that it doesn’t change it a single iota. Not a single iota. Any explanation as to the money that was used to buy the bonds? No. Except some checks were shown here. Which of the bonds were bought with those checks. I can’t say. I don’t know.”

All of the foregoing, as is shown, pertained entirely to the year 1943 and to the large amount of bonds which were bought in that year and had absolutely nothing to do with 1944, and in addition thereto, is a gross misstatement of the record as we showed in our opening brief, page 139.

And in this same connection, the Trial Judge told the jury [R. Vol. IV., page 1449]:

“The case is now pending as against the defendant Sam Ormont as to Count 1 only, and as to defendant Philip Himmelfarb as to Count 2 only.

“Counts 3 and 4, those relating to the income tax return of the defendant Sam Ormont for the years 1942 and 1943, the Court has given a judgment for the defendant upon motion of his counsel. The evidence in the Record, however, which relates to the conduct of the defendant Sam Ormont during the years 1942 and 1943 was not stricken from the Record, but was left in the Record in order for you to determine whether or not there was a specific

intent and whether or not there was willfulness, as I shall define 'willfulness' to you, on the part of Sam Ormont to do the things which he is charged with having done, in Count 1, which relates to his indictment in 1944; and for that limited purpose only."

Appellee, in trying to justify its argument to the jury on page 32 of its brief, contends that appellant is giving a meaning to that argument which was not intended by the prosecutor. This is indeed a weak explanation, because if his argument was so confusing and ambiguous that his intent did not clearly appear therefrom, then it most certainly was erroneous.

Subpoena Duces Tecum Served on Appellant in Presence of Jury Was Violative of His Constitutional Rights (Specification of Error No. 52).

On page 33 of appellee's brief, appellee admits the error but tries to escape responsibility therefor by blaming the Trial Court. This matter arose in the following manner:

Prosecuting attorney was seeking to introduce evidence as to the contents of certain books and records of the Acme Meat Company *as against defendant Phillip Himmelfarb*. Objections were duly interposed by Mr. Himmelfarb's counsel and were sustained on the ground that the books and records were the best evidence, and we quote from the Record:

"Q. (By Mr. Strong): Would you look at the income tax return of Phillip (368) Himmelfarb for the calendar year 1944, which is Government's Exhibit 3, I believe, in evidence? A. No. 4."

Q. Exhibit 4—and also look at the income tax return of Mrs. Phillip Himmelfarb, which is Exhibit

5 in evidence. Will you state what the return of Phillip Himmelfarb shows as having been reported by Phillip Himmelfarb as his salary for the calendar year 1944? A. \$4500.00.

Q. Do you disagree with that figure? A. Yes, I did.

Q. What did you claim, if anything, as the correct figure for salary received by Phillip Himmelfarb during 1944?

Mr. Katz: Objected to, if the Court please, as no foundation laid, incompetent, irrelevant and immaterial, the records would be the best evidence as to what the facts are with respect to that matter. It is incompetent, irrelevant and immaterial, not bearing on any issue in this case.

The Court: Yes. I think you are going to have to produce some records along here some place, Mr. District Attorney.

Mr. Strong: Well, your Honor, he has testified to the records which he used.

The Court: I know he did.

Mr. Strong: I have produced the income tax returns. [369]

The Court: Yes.

Mr. Strong: And the only other records are the books and records of the Acme Meat Company.

The Court: Well, actually the jury has to make this determination, whether he is right or not, and they are entitled to the same information that he had.

Mr. Strong: But he only relied on those documents.

The Court: He relied on the books and records.

Mr. Strong: Of the Acme Meat Company.

The Court: That is correct.

Q. (By Mr. Strong): Do you have the books and records of the Acme Meat Company? A. No, I have not.

The Court: You did have access to them, however, in making your calculations?

The Witness: Yes, sir.

Q. (By Mr. Strong): Where did you last leave them or see them?

Mr. Katz: That has been asked and answered, and has no bearing on any issue, if the Court please.

Mr. Strong: We don't have those books and records, your Honor, but we have some computations which the witness made from them.

Mr. Katz: Neither do we, your Honor. [370]

The Court: I cannot help it. It is still hearsay. Unless you produce the books and records here from which they are made so that the parties themselves may examine them and the jury, if they desire, may look at them.

Mr. Strong: They are not available to us, your Honor. I don't want to state the reasons in Court.

The Court: There are processes of the United States Government to use and you have the processes of this court.

Mr. Strong: Does your Honor suggest that I could use that process in a criminal case as to these books without going further into the books?

The Court: I am not suggesting anything. I am just reminding you that the law is here. Here is the body of the law which you can avail yourself of. I am not saying in advance whether you can correctly or properly do so, but I am saying that you cannot produce a witness on the stand, who has gathered information from books which are not here

and which the parties do not have available to examine and which the jury can see. *Otherwise it is the rankest kind of hearsay.*"

The record had previously shown that Mr. Ormont was transacting business under the name of Acme Meat Company, and with the foregoing transpiring between Court, Prosecuting Attorney and Counsel for Mr. Himmelfarb, in the presence and within the hearing of the jury, and subsequently on the afternoon of June 3, while Court was in session and in the presence of the jury, in walks a Deputy U. S. Marshal and walks over to Mr. Ormont and in direct view of the jury, serves him with a *Duces Tecum* Subpoena to produce the books and records of Acme Meat Company. Mr. Strong had caused this subpoena to be issued without first obtaining an order from the Trial Judge but obtaining it from another Judge. See Record Volume II, pages 805 to 808. This incident certainly could not have escaped the jury, because, as Mr. Strong says on page 890, the Deputy Marshal was a lady, and the Court remarked that she was a good-looking lady too. The Court denied that the appellant had been prejudiced, because there was no showing that the jury knew exactly what was going on. Obviously there was no way for us to show such a matter, without emphasizing it. We call the Court's attention to the case of *McKnight v. U. S.*, 115 Fed. 972, as the leading case on the subject in which it was held that it was prejudicial error to permit a *demand* to be made on a defendant in a criminal case in the presence of the jury as it was a violation of the immunity secured to him by the Fifth Amendment to the Constitution, providing that no person in any criminal case should be compelled to be a witness against himself, even though no order for the production of the paper is made, and the

demand is made solely because of its supposed necessity to authorize the introduction of secondary evidence. See also *Boyd v. U. S.*, 116 U. S. 616.

We have covered a portion of the errors assigned, because we are satisfied that we have covered a few of the fatal errors. All other errors assigned and not argued are obvious on their face, without the necessity of argument or citation of authorities, and we respectfully submit that the appellant is entitled to a reversal with instructions to dismiss the indictments and discharge the defendant, Ormont, in this case, for the many reasons herein and in our opening brief set forth.

Respectfully submitted,

DALY B. ROBNETT.

BENJAMIN F. KOSDON.

By DALY B. ROBNETT,

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